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19-P-252

Appeals Court

COMMONWEALTH vs. JAMIE V. KING.

No. 19-P-252.

Essex. September 10, 2019. - December 12, 2019.

Present: Wolohojian, Hanlon, & Agnes, JJ.

Practice, Criminal, Revocation of probation, Required finding. Internet. Obscenity, Child pornography. Due Process of Law, Probation revocation.

Indictments found and returned in the Superior Court Department on December 11, 2014.

A proceeding for revocation of probation was heard by Thomas Drechsler, J.

Matthew Malm for the defendant.
Kristen W. Jiang, Assistant District Attorney, for the Commonwealth.

WOLOHOJIAN, J. The defendant's probation was revoked by a Superior Court judge who found that the defendant had violated two conditions of his probation. On appeal, the Commonwealth acknowledges that the defendant's conduct did not violate the terms of one of those two conditions, while the defendant

acknowledges that the evidence was sufficient to find that he violated the other one. The issue before us is whether, in the circumstances presented, the matter must be remanded for resentencing. For the reasons set out below, we conclude that it must.

Background. The defendant pleaded guilty on June 2, 2015, to possession of child pornography. During the plea colloquy, the defendant admitted that he had downloaded many images and video recordings of child pornography, and that he had possessed a number of Polaroid photographs of his young relative in various stages of nudity, focusing on her genitalia and in some cases depicting her masturbating. The defendant was sentenced to five years of probation.¹ His probationary terms included special conditions proposed by the district attorney's office and adopted verbatim by the judge. They included the following four provisions:

"(2) The probationer shall refrain from deliberately engaging in unsupervised direct or indirect contact with any child under the age of eighteen (18), in any way, including but not limited to physical contact, auditory contact, and electronic contact (e.g., chat rooms, bulletin boards, electronic mail, etc.).

"(3) The probationer shall not access any internet services from any handheld device (e.g., Palm Pilots, Blackberries,

¹ At that time the defendant also pleaded guilty to a second count of possession of child pornography for which he was sentenced to two and one-half years in the house of correction. The five year term of probation was to run after the defendant completed his sentence in the house of correction.

and mobile telephones) and he shall disclose to Probation whether he presently possesses any of these devices or acquires any one or more of them in the future.

"(4) The probationer shall not use, enter, visit, participate in, or remain in any online chat room, bulletin board service, message board service, social networking site or service (for example, Facebook.com, Twitter.com, Instagram.com), or any other online communication service, with the sole exception of electronic mail. The probationer shall not disguise or attempt to disguise his identity or his address while accessing any online service.

". . . .

"(6) The probationer immediately shall disclose the names of all online services (e.g., an Internet service, an Internet Service Provider, an electronic bulletin board, an electronic news group, etc.), electronic mail providers, screen names, and passwords that he currently uses, and shall constantly continue to disclose these names and any new such information to Probation."

There was a discussion during the plea colloquy about the difference in scope between special conditions three and four. Defense counsel urged that special condition three, which restricted all access to the Internet from handheld devices, be limited to the scope of special condition four, which only restricted use of social media. The prosecutor disagreed, noting the difficulty of effectively monitoring a lesser restriction on portable handheld devices. The judge then inquired of the prosecutor whether, in contrast to special condition three (which prohibited all use of the Internet), special condition four would prohibit only access to social media. The prosecutor confirmed this intended distinction

between the two conditions. The discussion concluded with the judge stating, "I just want to make sure that Mr. King understands . . . that it's only the handheld device that would be subject to this bigger prohibition."

On May 11, 2017, the probation department alleged that the defendant had (1) violated special condition two by failing "to refrain from deliberately engaging in unsupervised direct/indirect contact with minor children," (2) violated special condition four by failing "to refrain from use of [the] internet for purposes other than that of business or personal email," and (3) violated special condition six by failing "to disclose [the] names of all online services/email providers and email accounts to probation."² It should be noted at this juncture that the defendant's alleged violation of special condition four (i.e., failing "to refrain from use of [the] internet for purposes other than that of business or personal email") does not track the language of special condition four.

The following information emerged at the probation surrender hearing. On May 10, 2017, the defendant's probation officer was notified by staff at the shelter in Salem where the

² A judge determined there was probable cause to support the allegations, and the defendant was held in custody pending the final probation revocation hearing. See Commonwealth v. Puleio, 433 Mass. 39, 41 (2000) (defendant may be held in custody pending completion of final probation violation hearing).

defendant lived that he possessed materials printed from the Internet, including pictures of young girls. The defendant had downloaded the materials from the Internet using a computer at a career center in Salem. Once downloaded, the defendant had e-mailed some of the materials to himself using an e-mail address made up of his name and birthdate, jamieking123075@gmail.com. The defendant never disclosed this e-mail address to probation as required. Instead, the defendant gave his probation officer a different e-mail address that at some point became inoperative.

Many of the materials contained images of young girls wearing scanty dance costumes in provocative poses. The printouts had been annotated by hand, with the name of the girl written next to her image. The defendant also printed out biographical information from a Wikipedia entry on a reality television series about young girl dancers, and then annotated those biographies by underlining the children's names, ages, and information about their siblings. The defendant had also annotated a printout of performance information, highlighting the names and ages of the young dancers, and placing check marks next to some of their names. He also printed out lists of the children's names, calculated their ages from their birthdates, and drew "smiley" faces next to some of the names. He also printed out a list of devices resulting from a Google search

seeking "ipods that plays videos." And he wrote that he wanted to download certain dance videos featuring child dancers "if or when I can get IPOD(s)."

Although defense counsel conceded during the hearing that the defendant's possession of these materials was a matter of concern for a person who, like the defendant, had previously been convicted of possessing child pornography, she argued that the defendant's conduct was not prohibited by the terms of his probation.

The judge expressed his concern about the defendant's possession of these materials, but he found that the Commonwealth failed to prove by a preponderance of the evidence that the defendant had engaged in unsupervised direct or indirect contact with minor children in violation of special condition two. As to special condition four, the judge found that the defendant's use of his e-mail account and his downloading of materials from the Internet constituted prohibited "use, enter[ing], visit[ing], participat[ing] in, or remain[ing] in any online chat room, bulletin board service, message board service, social networking site or service (for example, Facebook.com, Twitter.com, Instagram.com), or any other online communication service, with the sole exception of electronic mail." Finally, the judge found that the defendant

violated special condition six by failing to disclose his e-mail address to probation.

During the disposition phase of the hearing, additional information was placed before the judge. Specifically, in October 2016, after the defendant expressed an interest in obtaining employment, the probation officer referred the defendant to a career center that monitors computer usage. Soon thereafter, the career center notified the probation officer that the defendant was observed viewing questionable materials, which turned out to consist of information about school massacres and violence at schools. The probation officer did not initiate probation violation proceedings on this occasion, but referred the matter to the Salem Police Department. The probation officer also suspended the defendant's permission to use the career center, warned the defendant that he was not to use the career center computers for such purposes,³ and continued to supervise him.

The defendant thereafter remained in compliance with his probation conditions, and so he was allowed by the probation officer to return to the career center in February 2017 because

³ Although it was sensible for the probation officer to so warn the defendant, such a warning does not alter or expand a defendant's conditions of probation. It "is the function of the judge to set probation conditions, not the probation officer." Commonwealth v. Lally, 55 Mass. App. Ct. 601, 604 (2002).

he continued to express an interest in finding a job. Not long thereafter, on March 6, 2017, the career center reported that the defendant was using the computer to view pictures of children. The probation officer obtained printouts of the results of the defendant's Internet viewing and search history, which the probation officer described as "basically identical" to the materials we have described above. The defendant had downloaded these materials from the Internet, but on that occasion there was no indication that he had used an e-mail account. The probation officer initiated probation violation proceedings, alleging that the defendant had violated his probation by "unauthorized use of the internet." A different Superior Court judge disagreed, and found that the Commonwealth had failed to establish probable cause, specifically noting that the materials were not child pornography.

A couple of months later, the defendant was found to possess the materials that form the basis of the probation violation proceedings at issue here. The probation officer introduced a letter from the defendant's therapist in which she stated she was concerned that the defendant was at risk to reoffend, that his participation in programming was poor, and that he harbored anger and remained in denial.

On these grounds, the probation officer requested that the defendant's probation be revoked. Defendant's counsel, on the

other hand, asked that the defendant be reprobated, noting that the defendant had not committed new crimes, that he had reported faithfully to probation, and that his community service was on schedule.

The judge revoked the defendant's probation, explaining his decision as follows:

"[W]hatever concerns or ambiguities anyone wants to point out in [special condition] number four, it's clear to me what it does mean, and that is that he shouldn't be looking at any sort of electronic communication means -- he shouldn't be utilizing any sort of electronic communication means for the purpose of downloading pictures of young girls who are wearing very -- some of them, many of them, are in unusual poses, and they're wearing clothes, but they're very -- many of them depict young girls in the state of small bathing suits and clad in very minimal clothing, is the best way I can characterize it.

"But probably of greater concern to me is that he was simply supposed to disclose to you all online services. He had an e-mail account -- G-Mail account, which he gave to you, which turned out not to be accurate. He didn't provide you with the G-Mail account, the JamieKing12301975 G-Mail account, and all he needed to do to be compliant was tell you about that. Where it went from there remains to be seen.

"But that's the same account that he is -- in Exhibit One, he is downloading and viewing pictures of sparsely clothed young girls, after having been convicted of child pornography, and some of these young girls are in very -- what might be construed as provocative poses, although they are clothed.

"And they are very, very concerning to me, for someone who is on probation for something of this nature. And what concerns me more is that he hid this account from [his probation officer] and simply didn't disclose it.

"The fact that the e-mail may have bounced back to [defense counsel], which I accept, in May, means to me that the e-mail account that he had given to you is not valid. Well, that's not the issue. The issue is that he had a different e-mail account which he did not disclose, and it turns out that it's being utilized for what are very disturbing downloads.

"I'm also disturbed and concerned about the list of names with ages next to them of ages ranging, I think, from eight years old, nine years old, ten years old.

"And while there may be nothing inherently [il]legal about making a list of young girls' names with ages, it is disturbing, and it's for that very reason that his -- the conditions of probation that he agreed to required some sort of oversight or monitoring.

"Now, it may well be that if the violation was simply downloading the names and ages, or handwriting them, maybe I would or wouldn't find him in violation for that purpose.

"But the purpose of this is to monitor his behavior, to make sure -- to help him comply and to make sure that he complies with his treatment and complies with the condition of probation.

"If he wants to download the names of young girls on the Internet and write their names and ages next to them, well, he should disclose those to his Probation Officer, and if there's a dispute, or was a dispute as to whether or not that's legal or illegal, or a violation or not, that should have been brought forward, it should have been discussed.

"Right now, I'm having difficulty understanding what legitimate purpose is served by that, but I'm not finding him in violation because of the content, but because of his failures to comply with the order -- the requirements of disclosure and requesting permission if he was going to vary from the conditions that he agreed to.

"He didn't, at any time, come in and say, well, I need to look at the Internet for this purpose or that purpose, and then there could have been a discussion if there was a dispute as to whether or not that was an appropriate use of the Internet.

"I'm having difficulty with the concept that the undisclosed G-Mail account was used to gather those photographs I referred to, and I'm having difficulty with the Google searches, which he may have every right, and probably does, -- may have a right to Google search sports information on other things.

"If there was an ambiguity, it could have been resolved, but one thing I am seeing here is downloading the names of young girls and handwriting the names next to them, which disturbs me.

"But again, he's not being -- it's not alleged that the content of these is a violation; it's alleged that doing it is a violation, and failing to disclose that he was doing it is a violation.

"So, for all of those reasons, I am going to . . . give him two and a half to the House on the probationary count, one year to be served, balance suspended, to the original probation expiration date."

Discussion. On appeal, the defendant concedes that the evidence permitted the judge to find that he violated special condition six by failing to provide his e-mail address to probation. He argues, however, that the evidence was insufficient to permit the judge to find that he violated special condition four. The Commonwealth agrees, as do we. Special condition four did not prohibit the defendant from using the Internet generally, or downloading information from it. Instead, he was only prohibited from using, entering, visiting, participating in, or remaining in online communication services,

including chat rooms and social networking sites -- a prohibition from which e-mail was expressly carved out. Thus, special condition four did not prohibit the defendant's troubling conduct at issue here, and the judge erred in concluding otherwise.

Of course, with the benefit of appellate hindsight, one cannot help but ask whether special condition four should not have been written differently and, in particular, whether it should have expressly prohibited the defendant from using a computer to access images or information about children, whether via the Internet or otherwise. But the defendant cannot be found in violation of probationary conditions that might have been intended or would have made sense, only of those that are unambiguous and of which he has notice. See Commonwealth v. Lally, 55 Mass. App. Ct. 601, 603 (2002). "[P]robationers are entitled to reasonably specific conditions that provide clear guidelines as to what and when their actions or omissions will constitute a violation of their probation." Id. See Commonwealth v. Saud, 459 Mass. 221, 232 (2011), quoting Commonwealth v. Ruiz, 453 Mass. 474, 479 (2009) ("Due process 'requires that a defendant sentenced to probation receive fair warning of conduct that may result in the revocation of probation'"). And "ambiguities in probation conditions are

construed in favor of the defendant." Lally, supra. See Ruiz, supra at 481; Commonwealth v. Power, 420 Mass. 410, 421 (1995).

We recognize both the importance and difficulty of drafting clear special conditions of probation, especially when they involve technology. Although the general conditions of probation are contained in a preprinted Superior Court form, as required by Rule 56 of the Rules of the Superior Court, along with certain preprinted special conditions, none of those explicitly concern the use of technology. Thus, as it now stands, judges are required to craft such special conditions from scratch. In addition to input from the parties (as the judge solicited here) regarding the language to be employed, other resources are available to assist in crafting appropriate special conditions. We think it might also be helpful to supplement existing sources with a set of model, nonbinding special conditions of probation. Just as model jury instructions have relieved judges and lawyers of the time-consuming and difficult task of developing jury instructions from scratch in every case (while still permitting the use of case-specific instructions where appropriate), model special conditions of probation would do the same, especially where special terms of probation may be particularly appropriate, such as for sex offenders and those who use technology to commit crimes, as in the present case, but also in domestic violence

and other cases where probationers are participating in specialized court programs. Finally, model special conditions could help reduce the risk of litigation over whether the conditions imposed in a particular case were incomprehensible, vague, or otherwise lacking in precision.

Although the judge erred in finding the defendant in violation of special condition four, he permissibly found that the defendant violated special condition six by failing to disclose his e-mail address to probation. The judge could have revoked the defendant's probation for that violation alone because "[a]ny conduct by a person on probation which constitutes a violation of any of the conditions of his probation may form the basis for the revocation of that probation." Commonwealth v. Durling, 407 Mass. 108, 112 (1990). However, revocation was not the only available remedy nor was it mandated; other permissible dispositions included modifying the terms of probation or reprobating the defendant. Commonwealth v. Eldred, 480 Mass. 90, 102 (2018). "How best to deal with the probationer is within the judge's discretion," Durling, supra at 111, after "weighing 'various, often competing, considerations.'" Commonwealth v. Plasse, 481 Mass. 199, 205 (2019), quoting Commonwealth v. Rodriguez, 461 Mass. 256, 259 (2012). Among those considerations are "such factors as public safety; the circumstances of any crime for which the probationer

was placed on probation; the nature of the probation violation; the occurrence of any previous violations; and the impact of the underlying crime on any person or community, as well as mitigating factors." Eldred, supra at 103, quoting Rule 8(d) of the District/Municipal Court Rules for Probation Violation Proceedings.⁴

Here, the judge was entitled to consider the totality of the information placed before him in considering the appropriate disposition, including the fact that the defendant had used the Internet to obtain images and information of young girls, and had e-mailed that information to himself. However, the judge mistakenly viewed this conduct as having violated the defendant's conditions of probation, a conclusion that necessarily subsumed a determination that the defendant was on notice that his conduct was prohibited. See Ruiz, 453 Mass. at 479 (due process "requires that a defendant sentenced to probation receive fair warning of conduct that may result in the revocation of probation").

We "cannot be confident that [the judge's] decision was not substantially influenced" by these mistaken determinations. Commonwealth v. Marcus M., 92 Mass. App. Ct. 1, 6 (2017). The judge's explanation of his disposition repeatedly referenced his

⁴ The District Court's articulation of factors to be considered is equally apt in this Superior Court case.

view that the defendant's use of the Internet and e-mail violated the terms of his probation, interweaving that conduct with the defendant's failure to disclose his e-mail address to probation. In these circumstances, it is not for us to speculate what action the judge would have taken had he found that the defendant violated probation only by failing to disclose his e-mail address to probation. See Commonwealth v. Aquino, 445 Mass. 446, 450-451 (2005). "To do so would effectively, and improperly, supplant the judge's opportunity to exercise his discretion, on appropriate evidence, in the first instance." Commonwealth v. Arroyo, 451 Mass. 1010, 1011 (2008).

Accordingly, on the order revoking probation and imposing sentence, so much of the order that finds the defendant violated special condition six is affirmed, and the remaining finding of violation is reversed. The sentence is vacated and the case is remanded to the Superior Court to allow the judge to consider the appropriate disposition for the defendant's violation, which may include modifying the terms of his probation.

So ordered.